

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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LATEACHEEAH G. ANDERSON
SALVATTO, and RICHARD
SALVATTO, individually and as
guardians for JAMAL THROWER, a
minor,

NO. CIV. S-04-0163 WBS GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER RE:
MOTION FOR SANCTIONS

COUNTY OF SOLANO, CITY OF
VALLEJO, COUNTY OF SOLANO
SHERIFF'S DEPARTMENT,
LIEUTENANT LIDDICOET, OFFICER
K. MCCARTHY, VALLEJO POLICE
DEPARTMENT, WATCH COMMANDER K.
SCHROEDER, CORPORAL B. CLARK,
OFFICER WHITNEY,

Defendants.

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Plaintiffs filed this lawsuit pursuant to 42 U.S.C. § 1983, as well as supplemental state law causes of action, alleging several incidents of improper police conduct. Defendants now move for sanctions in the form of striking plaintiffs' disclosure of a rebuttal expert witness, as well as precluding any and all testimony that expert will provide.

1 On March 20, 2006, this court entered a Status
2 (Pretrial Scheduling) Order, which required the parties to
3 disclose expert witnesses and produce reports in accordance with
4 Federal Rule of Civil Procedure 26 no later than October 20,
5 2006. The order also stated that "with regard to expert
6 testimony intended solely for rebuttal," those disclosures and
7 reports were to be filed no later than November 10, 2006.

8 On October 20, 2006, defendants disclosed their expert
9 witness with an accompanying report, but plaintiffs did not. On
10 November 10, 2006, the date rebuttal expert disclosures and
11 reports were due, plaintiffs contacted defendants and requested
12 an extension of the deadline. Defendants stipulated to extend
13 the deadline until November 22, 2006, but only for the expert
14 report. Later that day plaintiffs disclosed David A. Dusenbury
15 and Associates as a rebuttal expert witness, indicating that Mr.
16 Dusenbury would testify "regarding police practices, including
17 the use of force, and the reasonableness of the arrest and
18 detention, as well as police training practices procedures
19 surrounding the detention and arrest of Plaintiff Lateacheeah
20 Salvatto." (Pls.'s Disclosure of Rebuttal Expert Witness 2.) On
21 November 22, 2006, plaintiffs emailed the expert report to
22 defendants.¹

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24 ¹ Defendants note that plaintiffs emailed the report at
25 12:37pm, thirty-seven minutes later than the agreed upon time of
26 noon. Plaintiffs' email accompanying the report indicates that
27 counsel experienced technical problems in printing the report,
28 and was therefore delayed and forced to resort to email as a
means of transmission. (Whitefleet Decl. Ex. D.) The court sees
no reason to sanction plaintiffs merely for such a minor delay,
as it is highly unlikely that any prejudice resulted. See e.g.
Jones v. Tozzi, 2006 WL 355175, *4 (E.D.Cal. Feb. 15, 2006)

1 Defendants now bring a motion for sanctions pursuant to
2 Federal Rule of Civil Procedure 37 and Local Rule 37-251(e)(2),
3 arguing that the testimony of plaintiffs' expert goes beyond mere
4 rebuttal evidence, but instead to plaintiffs' *prima facie* case.

5 Rule 26 provides that "a party shall disclose to other
6 parties the identity of any person who may be used at trial to
7 present evidence." Fed. R. Civ. P. 26(a)(2)(A). "These
8 disclosures shall be made at the times and in the sequence
9 directed by the court." Fed. R. Civ. P. 26(a)(2)(C). Rule
10 37(c)(1) provides that a party who fails to disclose information
11 as required by Federal Rule of Civil Procedure 26, unless such
12 failure is harmless, is not "permitted to use as evidence at a
13 trial, at a hearing, or on a motion any witness or information
14 not so disclosed." Fed. R. Civ. P. 37(c)(1); see Yeti by Molly,
15 Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir.
16 2001).

17 If indeed the testimony and report by Mr. Dusenbury
18 that plaintiffs' wish to offer are in violation of this court's
19 pretrial scheduling order, than sanctioning plaintiffs by
20 precluding this evidence might be appropriate. At this point,
21 however, prior to trial, the court cannot necessarily say that
22 the proposed evidence is improper. Other than the brief one-
23 sentence description contained in the initial disclosures, the
24 court cannot presume to know the substance of Mr. Dusenbury's
25 testimony or his report.

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27 (citing Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814
28 (9th Cir. 1985)) (overlooking a two hour filing delay in order to
address the merits).

1 Once this evidence is offered by plaintiffs at trial,
2 the court will be in a much better position to assess Mr.
3 Dusenbury's testimony and report, and determine whether or not it
4 is truly "rebuttal." Additionally, at that point the court will
5 be more able to balance any potential prejudice to defendants, if
6 the evidence is admitted, against any prejudice to plaintiffs, if
7 the evidence is excluded.

8 It is well established that the issuance of sanctions
9 under Rule 37 falls within the broad discretion of the district
10 court. Yeti, 259 F.3d at 1106 ("[W]e give particularly wide
11 latitude to the district court's discretion to issue sanctions
12 under Rule 37(c)(1)."); see also United States v. Batts, 573 F.2d
13 599, 610 (9th Cir. 1978) (citing United States v. Perez, 491 F.2d
14 167 (9th Cir. 1974) cert. denied, 419 U.S. 858 (1974)) ("The
15 admissibility of rebuttal evidence is subject to the sound
16 discretion of the trial court."). Therefore, for the foregoing
17 reasons, the court will defer ruling on defendants' motion for
18 sanctions. If the court determines at trial that the testimony
19 is not simply rebuttal but expert opinion which should have been
20 disclosed earlier, the court may impose such sanctions as
21 appropriate under Fed. R. Civ. P. 37()(c) ("In addition to or in
22 lieu of [precluding evidence], the court . . . may impose other
23 appropriate sanctions.").

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1 IT IS THEREFORE ORDERED that defendants' motion for
2 sanctions be, and the same hereby is, DENIED, without prejudice
3 to its being raised at the time of trial if and when the
4 testimony of Mr. Dusenbury is offered.

5 DATED: January 9, 2007

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8 WILLIAM B. SHUBB
9 UNITED STATES DISTRICT JUDGE

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